PETITIONER:
M/S HINDUSTAN TIMES LIMITED

Vs.

RESPONDENT:
UNION OF INDIA & OTHERS

DATE OF JUDGMENT: 07/01/1998

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

M. JAGANNADHA RAO. J.

This is an appeal preferred against the judgment of the Delhi High Court dated 28.8.1080 in C.W.P. No. 843 of 1980 dismissing the Writ Petition of the Petitioner. The writ petition was filed questioning the order of the Regional Provident Fund Commissioner dated 7.5.1980 passed under section 14-B of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter called the 'Act') levying damages in a sum of Rs 44,220.00 and Rs. 1,035.50 for delay in remitting the employees provident fund contribution within the period stipulated in para 38.10 of the Employees Provident Scheme. 1952 for the period July 65, October 65 December, 65 January 66 to March 66, August 66, July 67, August 67, May 68, July 68 to November 68.

The writ petition was dismissed by a Division Bench of the High Court on 28.8.80 by a non-speaking order merely saying "dismissed". It is against the said judgment that this appeal has been preferred.

The facts of the case are as follows:

The appellant is the employer. On account of delay in payment of provident fund contributions, a notice was issued on 23.3.71 by the Department complaining of delays in remitting the provident fund amounts for the period July 65, October 65, December 65 to March 1966, August 1966, September 1966, December 1966 to February 67, July 67 to August 67, January 68, April 68 to November 68 and September 1972 and stating that the amounts were credited in the accounts of the department only after 20th of the 'following' months. The appellant was requested to inform whether the cheques for these months were "tendered" "on or before 20th of the following month" to which the payment relates. The appellant sent a letter dated 19.12.1872 giving only the dates on which the cheques were signed by the appellant. Therefore, the department sent a further letter dated 10.1.1973 asking the appellant to furnish "proof of the dates of presentation of cheques".

It does not appear that the appellant sent any further reply to the Department. However, there was also no further correspondence from the side of the department. We only have

the show cause notice dated 24.3.79 by the department asking the appellant as to why, consequent to delay in the remittal of the PF contributions, damages in a sum of Rs. 51,970,10 and administrative charges in a sum of Rs. 1215.10 should not be recovered for the period from July 1965 to September, 1972.

The appellant's representative attended the hearing of the case on 1.5.79 and 3.7.79 and finally filed a reply on 5.2.80 raising various contentions. A copy of the letter dated 23.10.1979 from the Bank giving details was also enclosed. After referring to various contentions and rejecting some of them, the Regional Provident Fund Commissioner stated that the payments for September 1966 and September 1972 were as stipulated in para, 38 of the scheme, and going by the dates of the challans and treating those dates as the dates of presentation of cheques in the Bank, the deposits for December 66, January 67, February 67, January 68, April 68 and June 68 were "treated to have been deposited..... within the time stipulated in para 38" of the Scheme whereas the rest of the payments were treated as belated and amenable to damages. There was also no proof of strikes by the workers for the period 23rd July to 16th September 1968. The interpretation of para 38 of the Scheme that "the question of payment of contribution should arise only after employees share of contribution has been deducted from their wages" was rejected, in view of para 30, 32 of the Scheme. It was also stated that for collection of the amounts under Section 14B, there was no period on limitation. The delay was "immaterial". It was however stated that no formal orders were passed by his predecessor "deciding not to raise any demand", as contended by the appellant in the appellant's reply dated 5.2.80. In the result the impugned order dated 7.5.80 was passed for recovery of Rs. 44,220.00 as damages and Rs. 1035.50 as administrative charges as compared to Rs. 51,990.10 and Rs. 1215.15 mentioned in the show cause notice.

In this appeal, learned Senior counsel for the employer Dr. Shankar Ghosh contended that the demand notice issued on 7.5.80 in respect of alleged belated payments of the period from 1965 to 1968 was arbitrary and unreasonable, that the demand was dropped in 1971 and must be deemed to have been waived and that going by the dates of the cheques, the payments must be deemed to be in time. We have heard Sri Harish Chandra for the department.

At the outset, we may sat that the Division Bench of the High Court of Delhi ought to have given reasons at least briefly, which dismissing the writ petition in limine. As stated in Fauja Singh vs. Jaspal Kaur [1996 (4) SCC 461], on the plainest consideration of justice, the High Court should have given reasons. The absence or reasons has deprived the Supreme Court from knowing the circumstances which weighed with the High Court to dismiss the matter in limine. It was an unsatisfactory method of disposal. The necessity to provide reasons, howsoever brief, in support of the High Courts' conclusions is too obvious to be reiterated. Obligation to give reasons introduces clarity and excludes or at any rate minimises the chances of arbitrariness and the higher forum can test the correctness of those reasons. It becomes difficult for this Court in all such cases to remit the matters to the High Court inasmuch as by the time cases reach this Court, several years would have passed.

In an article 'On Writing Judgments', Justice Michael Kirby of Australia [(1990) (Vol.64. Australian Law Journal p.691)] has approached the problem from the point of view of the litigant, the legal profession, the subordinate

Courts/tribunals, the brother Judges and the judges' own conscience. To the litigant, the duty of the Judge is to uphold his own integrity and let the losing party know why he lost the case. The legal profession is entitled to have it demonstrated that the Judge had the correct principles in mind, had properly applied them and is entitled to examine the body of the Judgment for the learning and precedent that they provide and for the reassurance of the quality of the Judiciary which is still the centre-piece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy Judge, the Judge prone to errors of fact etc. The reputational considerations are important for the exercise of appellate rights, for the Judges' own self-discipline, for attempts at improvement and the maintenance of the integrity and quality of our judiciary. From the point of view of other Judges, the benefit that accrues to the lower heirachy of Judges and tribunals is of utmost importance. Justice Asprey of Australia had even said in Pettit vs. Dankley [(1971 (1) NSWLR 376 (CA)] that the failure of a Court to give reasons is an encroachment upon the right of appeal given to a litigant. In our view, the satisfaction which a reasoned Judgment gives to the losing party or his lawyer is the test of a good Judgment. Disposal of cases is no doubt important but quality of the judgment is equally, if not more, important. There is no point in shifting the burden to the higher Court either to support the judgment by reasons or to consider the evidence or law for the first time to see if the judgment needs a reversal.

We shall now proceed to take up the main issues arising in this appeal.

Section 14.B as amended by Act 40/73 w.e.f. 1.11.1973, confers power on the concerned authority to recover damages. Where an employer makes default in the payment of any contribution to the Trust Fund the concerned authority may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme. The section itself, after the 1973 amendment, now provides that before levying and recovering damages, the employer shall be given a reasonable opportunity of being hear. The scheme referred to in Section 15-B is the Employees Provident Scheme 1952, so far as provident fund contributions are concerned.

Under clause 29 of the said Scheme, the contribution payable by the employer shall be equal to the contribution payable by the employee. Under clause 32(3).

> "any sum deducted by an employer from the wages of an employee under this scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted"

Therefore, the scheme creates a fiction of entrustment.

Clause 38 deals with the mode of payment and says that the employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employees contribution from his wages which together with his own contribution as well as an administrative charge, shall be paid within 15 days of the close of every month into the Fund by separate bank drafts or cheques,

> "Provided that if the payment is made by a cheque, it should be

drawn only on the local bank of the place in which deposits are made"

This is obviously meant for early clearance and for payment into the fund.

Clause 52 requires investment of the monies belonging to the Employees Provident Fund. Clause 60 requires interest to be credited to the member's account. The computation of damages shows that the department permits a 'grace period' of 5 days and it is only thereafter that the damages are computed. Section 11 of the Act deals with 'penalties'. Further under section 405, Explanation-I of the Indian Penal Code. 1860, if a person being an employer, deducts the employees contribution from the wages payable to the employees for crediting to a provident fund or family pension fund established by any law for the time being in force, the said amount shall be deemed to have been entrusted with the amount of the contribution so deducted by him and in default, the person could be liable for criminal breach of trust.

It appears that, soon after 1952 delays in remitting the contributions under the Act became chronic and the arrears payable to the Trust Fund increased from time to time. This was because initially the maximum damages awardable was only 25% of the arrears and no interest is payable. Therefore by an Amendment in 1973 the damages were increased from 25% to a maximum of 100%. The Statement of objects and Reasons of the Bill which became Act 40/73 stated that the arrears in 1959-60 were Rs. 3.65 crores; in March 1970, they rose to 14.6 crores and by March 1971 to Rs.20.65 crores. It was stated there that the employers were using these monies "in their business". The National Commission on Labour recommended stringent measures in its 116th Report which was endorsed by the Estimates Committee, resulting in the 1973 Act.

In Coal Mines Provident Fund Commissioner, Dhanbad & Other vs. J.Lala & Sons [1976 (3) SCR 365], interpreting section 10F of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, it was stated by this Court that by the use of the words 'may levy damages', in case of default in payment of contribution, and the words 'as it may think fit to impost', it was clear that the determination was not based on the inflexible application of a rigid formula and that by these words, the authorities were to apply their mind to the facts and circumstances of the case. As a duty was judicially imposed on the authority, principles of natural justice were implied. In Organo Chemical Industries & Another vs. Union of India & Others [1980 (1) SCR 61], where the vires of the Act were upheld, this Court laid down that while passing orders under section 14-B, the authority was acting in a 'quais-judicial' capacity and was bound to give reasons for its orders. The levy was not necessarily proportionate to the loss incurred by the employee inasmuch as it was partly compensatory and partly penal.

Organo case itself was one where there were delays in payment of the contributions and the explanations given were rejects. The order of the Commissioner interfered with by the Supreme Court. There the default related to the period from March to October 1975 and again from December 1975 to November, 1976. The show cause notice was issued on 7.6.1977 and in response, the appellants stated that the remittal was delayed "due to difficulties beyond their control and.... there were disputes between partners of the firm, there was a power-cut of 60%..... w.e.f.May 6, 1974 an d there were huge amounts of loan payable to the Haryana Financial Corporation". However, the Regional Provident Commissioner

by his orders dated 16.8.1977 rejected all these contentions and held that the obligation to pay these contributions into the fund was unqualified. The explanations of the employer were not acceptable. The default could not be linked with the financial problems facing the establishment. It was stated by the Commissioner that the 50% of the employees contributions was

> "trust money with employer for deposit in the statutor; fund. The delay in the deposit on this part of the contributions amounted to breach of trust......."

He also found that the appellants in that case were Habitual defaulters and that the maximum damages fixed under the Act was to be levied, when the matter came to this Court, A.P.Sen,J. observed that the default was wilful inasmuch as the appellants,

> "have been utilising the amounts deducted from the wages of their employees, including their own contributions, as well as administrative charges, in running their business"

Krishna Iyer,J. in his concurrent judgment, characterised such used as amounting to 'embezzlement'.

As to the manner in which the concerned authority could arrive at the 'damages', A.P.Sen, J. stated that the authority usually takes into consideration, - as was done in that case - the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The damages were to be compensatory and penal as well and hence principles of estimation of damages under the law of Contract or Torts, were not applicable.

The first contention in behalf of the appellant in the context of section 14B is that a period of limitation must be implied under law for, according to the appellant, it will be wholly unreasonable to allow the power to be exercised after the lapse of a large number of years.

Now the Act does not contain any provision prescribing a period of limitation for assessment or recovery of damages. The monies payable into the Fund are for the ultimate benefit of the employees but there is no provision by which the employees can directly recover these amounts. The power of computation and recovery are both vested in the Regional Provident Commissioner or other officer as provided in section 14-B. Recovery is not by way of suit, initially, it was provided that the arrears could be recovered in the same manner as arrears of land revenue. But by Act 37/53 section 14-B was amended providing for a special procedure under section 8-B to 8-G. By Act 40/73 section 11 was amended by making the amount a first charge on the assets of the establishment if the arrears of employee's contribution were for a period of more that 6 months. By Act 33/88, the charge was extended to the employee's share of contribution as well.

In spite of all these amendments, over a period of more than thirty years, the legislature did not think fit to make any provision prescribing a period of limitation. This in our opinion is significant and it is clear that it is not the legislative intention to prescribe any period of limitation for computing and recovering the arrears. As the amounts are due to the Trust Fund and the recovery is not be suit, the provisions of the Indian Limitation Act, 1963 are not attracts. In Nityanand M. Joshi vs. Life Insurance Corporation of India [1970 (1) SCR 396], it has been held

that the Limitation Act, 1963 has no application to Labour Courts and, in our view, that principle is equally applicable to recovery by the concerned authority under section 14-B. Further in Bombay Gas Co. Ltd. vs. Gopal Bhiva [1964 (3) SCR 709], it has been held that in respect of an application under section 33(c)(2) of the Industrial Disputes Act, 1974, there is no period of limitation. In that context, it was stated that the Courts could not imply a period of limitation. It was observed:

> "It seems that where the legislature has made no provision for limitation, it would not be open to the Court to introduce any such limitation on the grounds of fairness or justice"

The above decisions have been recently accepted in Mukri Gopalan vs. Cheppilet [1995 (5) SCC 5(at p.20-22)] to which one of us (Majmudar, J.) was a party while dealing with the applicability of section 29(2) of the Limitation Act, 1963 to Courts or Tribunals. We may also point out in this connection that several High Courts have rightly taken the view that there is no period of limitation for exercise of the power under section 14B of the Act.

It is true that a principle has been laid down in State of Gujarat vs. Patil Raghav Natha [1969 (2) SCC 187], while dealing with suo motu revisional jurisdiction that though there is no period of limitation prescribed for exercise of that power, still such a power must be exercised within reasonable time. The said judgment has been applied in matters relating to section 6 to the Land Acquisition Act in a large number of cases, which were all referred to recently in Ram Chand vs. Union of India [1994 (1) SCC 45]. In our view, this line of cases cannot ordinarily apply to monies withheld by a defaulter, who holds them in trust.

The reason is that while in the above cases decided by this Court the exercise of powers by the authority at a very belated stage was likely to result in the deprivation of property which rightly and lawfully belonged to the person concerned, the position under section 14B of the Act of an employer is totally different. The employer who has defaulted in making over the contributions to the Trust Fund had, on the other hand, the use of monies which did not belong to him at all. Such a situation cannot be compared to the above line of cases which involve prolonged suspense in regard to deprivation of property. In fact, in cases under Section 14-B if the Regional Provident Commissioner had made computations earlier and sent a demand immediately after the e amounts fell due, the defaulter would not have been able to use these monies for his own purposes or for his business. In our opinion, it does not lie in the mouth of such a person to say that by reason of delay in the exercise of powers under section 14B, he has suffered loss. On the other hand, the defaulter has obviously had the benefit of the 'boon of delay' which "is so dear to debtors", as pointed out by the Privy Council in Nagendranath Dev vs. Suresh Chandra Dev [ILR 60 Cal. 1(PC)]. In that case, it was observed that equitable considerations were out of place in matters of limitation and the strict grammatical construction alone was the guide. Sir Dinshaw Mulla stated:

> "Nor in such a case as this is the judgment debtor prejudiced. Be may indeed obtain the boon of delay, which is so dear to debtors and if he is virtuously inclined there is nothing to prevent his paying what

he owes into Court."

The position of the employer in case of default under section 14-B is no different.

A learned Single Judge of the Bombay High Court in K.T.Rolling Mills vs. R.M.Gandhi [1994 LLJ. 66] was dealing with a case like the one before us where the default occurred because of the delay in realisation of monies paid by cheques. The recovery proceedings were initiated after 12 years and they were quashed solely on the ground of unreasonable delay relying upon Patil Raghav Natha's case [1969 (@) SCC 187] and other cases. The said judgment was reversed in Regional Provident Fund Commissioner vs. K.T.Rolling Mills Pvt. Ltd. [1995 (1) SCC 181] by this Court holding that while it was true that normally powers for the exercised within reasonable time, the order in that case was not liable to be struck down not only because in Maharashtra there were 22, 189 establishments in 1985 - which made if difficult to monitor delays - but also because the monies must have been used (by the employer) for its own purpose and that too without paying interest, at the cost of those for whose benefit it was meant. Any different stand would, it was held, encourage the employers to thwart the object of the Act, which could not be permitted. We are in respectful agreement with the above observations.

We shall now refer to the Judgments of some of the High Courts to cull out some broad guidelines. The Orissa High Court in Orissa Forest Development Corporation Ltd. & Another vs. Regional Provident Fund Commissioner, Orissa [1995 (71) IFLR 388 (Orissa)] and a Single Judge of the Punjab & Haryana High Court in Amirchand & Sons vs. State of Punjab [AIR 1965 Pun. 441] have held like the Single Judge of the Bombay High Court in K.T.Rolling Mills case, that if there was undue delay in initiating action under section 14B which the Court thought was unreasonable, on that sole ground the demand could be struck down. With great respect, this view is, as already stated, clearly wrong. The Judgment of this Court in K.T. Rolling Mills case having been reversed by this Court, the above view is no longer good law. In fact, the Punjab judgment was rightly reversed in appeal in State of Punjab vs. Amirchand [1964 (37) FJR 92(P&H)]. The view taken by the learned Single Judge of the Punjab & Haryana High Court in 1965 has also been rightly dissented by the Delhi High Court in Birla Cotton Spinning & Weaving Mills Ltd. vs. Union of India (CWP 390/78) dated 29.7.83: by the Gujarat High Court in Gandhidham case [1987 LIC 659]; the Patna High Court in M/S Inter State Transport Agency, Sitamarhi vs. Regional Provident Fund Commissioner, Patna [1984 LIC 940] and the Allahabad High Court in The Northern India Press Works vs. Regional Provident Fund Commissioner, U.P. & Others [1983 LIC 1314 (All)].

The Gujarat High Court in Gandhidham Spinning & Mfg. Co. Ltd, vs. Regional Provident Fund Commissioner & Another [1987 Lab. I.C. 659 (Guj.)] (to which, one of us Majmudar, J. was a party), laid down a principle that 'prejudice' on account of delay could arise if it was proved that it was "irretrievable". There it was observed that for purposes of section 14B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the employees, who are third parties, cannot suffer. It was further observed:

> "The only question that would really survive is the one whether on the facts and circumstances of a given case, the show cause notice issued after lapse of time can be

> said to be issued beyond reasonable time. The test whether lapse of time is reasonable or no will depend upon the further fact whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show cause notice."

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and proved in the reply to the show cause notice. We may add that if such a plea is rejected by the department, it cannot be raised in the High Court unless specifically pleaded. The above principle of prejudice laid down by Gujarat High Court in Gandhidham Spinning & Mfg. Co. Ltd. (Guj.) has been followed by the Bombay High Court in S.T.G.. P&D Mill Prakriya vs. Regional Provident Fund Commissioner, Bombay [1996 (72) FLR 823 (Bom.)]; M/s Super Processors vs. Union of India & another [1992 Lab. I.C.808 (Bom.)].

A different aspect of prejudice was referred to in M/s Sushma Fabrics Pvt. Ltd, vs. Union of India & another [1991 Lab. I.C.1946 (Bom.)] by a learned Single Judge of the Bombay High Court. It was stated that in some cases there could be serious prejudice on account of abnormal delay in taking proceedings under section 14B, either because the records or accounts of the defaulter are lost or on account of the concerned personnel acquainted with the facts of a by-gone period no long er being available for unearthing the facts. But such pleas must be raised before the department and strictly proved. In case such facts are proved it is possible in some cases that there is irretrievable prejudice.

It has also been held rightly that mere delay on the part of the department could not be treated as amounting to waiver (Divisional Engineer, APSEB vs. RPF Commissioner [1979 Lab. I.C.(AP) 187]; M/S Inter State Transport Agency vs. RPF Commissioner [1983 LIC 940 (Patna)]; State of Punjab vs. Amirchand [1964 (37) FJR 92 (P&H)]. This view is, in our opinion, correct.

We have already stated that in Organo [1980 (1) SCR 61], the Regional Provident Fund Commissioner held that power cut financial problems, disputed between partners were not relevant explanations and that the said view was not interfered with by this Court.

From the aforesaid decisions, the following principles can be summarised: The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on pleas of power cut, financial problems relating to other indebtedness or the delay in realisations of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under section 14B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under section 14B would be

taken; mere delay in initiating action under section 14B cannot amount to prejudice inasmuch as the delay on the part of the department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under section 14B, he had changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature: he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.

In the present case before us, no doubt there is delay of 14 years in initiating action and the damages are levied because of the delay in realisation of the amounts paid by cheque where the amounts were credited into the accounts of the department beyond the grace period of 5 days. The plea of strike, even assuming it to be relevant, was not proved. The plea of the appellant that the department must be deemed to have dropped the proceedings in 1971 did not also have any legs to stand. There is no plea of any irretrievable prejudice either in the reply to the show cause or in the writ petition.

For the aforesaid reasons, this appeal fails and is dismissed. There shall be no order as to costs.